No. 13153

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*,

vs.

HENRY S. WAECHTER, HAZEL MILLER and WILLIAM T. WAECHTER, Co-Executors of the Estate of May Florence Waechter, Deceased, *Appellees*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE LEON R. YANKWICH, *Judge*

BRIEF OF APPELLEES

EGGERMAN, ROSLING & WILLIAMS,
JOSEPH J. LANZA,
Attorneys for Appellees.

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INDEX

TABLE OF CASES

TEXTS

STATUTES AND REGULATIONS

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JURISDICTION

District Court—

This is a civil action brought by Appellees, who are the duly appointed, acting and qualified Executors of the Estate of May Florence Waechter, Deceased, against the United States of America, Appellant, for the recovery of internal revenue taxes which were allegedly erroneously and illegally assessed and collected as an Estate Tax by the Collector of Internal Revenue at Tacoma, Washington, involving an amount under $10,000.00 (R. 15, 16). An Estate Tax Return was filed on behalf of the Estate on March 22, 1948 (R. 16). In the Return, the Executors, reported a gross estate of

$77,480.25, and a tax liability of $850.62, which amount accompanied the Return (R. 17). In the assets listed in that Return under Schedule F, was included the cash surrender value of certain insurance policies upon the life of decedent's surviving spouse, Henry Waechter (R. 16, 17). Subsequently, the Executors paid a deficiency of $1,680.04, which was assessed by reason of matters not in issue here (R. 18). On August 24, 1949, the Executors filed a timely claim for refund of $1,-459.33, based upon the alleged overpayment of estate tax in that amount due to inclusion in decedent's gross estate of one-half of the cash surrender value of the insurance policies above mentioned (R. 18). Six months elapsed, during which the Commissioner neither allowed nor disallowed the claim (R. 18). This suit was timely instituted on April 6, 1950 (R. 12, 18), which was within the time provided by Section 3772(a)(2) of the Internal Revenue Code. The District Court had jurisdiction of the case under Judicial Code Section 24, as amended, and U.S.C.A. Title 28, Sections 1340 and 1346.

Court of Appeals—

Final decision and judgment of the District Court for the Western District of Washington, Northern Division, was entered on August 8, 1951 (R. 31, 32). Notice of Appeal by the United States was filed on October 3, 1951 (R. 32), which was within sixty days from the entry of said judgment, as provided in Rule 73(a) of the Rules of Civil Procedure governing the time permitted in any action in which the United States is a party. Jurisdiction of this Court has been properly invoked under U.S.C.A. 28, Section 1291.

STATUTES INVOLVED

(See Appendix)

SUMMARY OF ARGUMENT

1. One-half of the cash surrender value of the policies in question was not subject to "decedent's power of testamentary disposition" and therefore is not includible as part of her gross estate under Section 811(e)(2).

2. Congress expressly covered the taxability of all phases of life insurance by Section 811(g) and if it intended to tax any part of the cash surrender value of such policies upon the death of the non-insured spouse, in a community property estate, it would have logically covered the subject in Section 811(g) rather than leave the matter to speculation and doubt under Section 811(e)(2).

3. No interest was possessed by decedent at the time of her death in and to any part of the cash surrender value of the policies on her husband's life so as to be taxable under Section 811(a).

ARGUMENT

I.

One-half of the Cash Surrender Value of the Policies in Question Was Not Subject to "Decedent's Power of Testamentary Disposition" and Therefore Is Not Includible as Part of Her Gross Estate Under Section 811 (e) (2).

Prior to enactment, on October 21, 1942, of Code Section 811(e)(2) and other provisions, by the Revenue Act of 1942, the Federal Estate Tax Law did not prescribe the method to be employed in taxing community

property. By virtue of a number of court decisions, however, it became settled that, with certain exceptions, existing only because the particular holding did not conform to certain requirements, community property was includible in the estate of the first spouse to die to the extent of one-half of its value. The one-half was includible under Code Section 811(a) reading "to the extent of the interest therein of the decedent at the time of his death."

This resulted in a considerable advantage to residents of community property states. Lifetime transfers were considered to be half from the husband and half from the wife. Further, because the husband was more likely to die first, and because he was usually responsible for the accumulation of the estate, the taxing of only one-half the community upon the death of the first to die almost invariably resulted in a tax saving. Even where the spouse who contributed least died first, there was an advantage if the surviving spouse died within five years thereafter, or if the first spouse left his or her half to others than the survivor.

Code Section 811(e)(2) enacted by the 1942 Act, and effective as to estates of decedents dying after October 21, 1942, and prior to January 1, 1948, changed all this. That section required that there be included in the estate of a deceased joint holder of property in community the entire value of the community property except to the extent that such property could be shown to have stemmed from compensation received by such decedent's surviving spouse for personal services actually rendered or from the separate property of such surviving spouse. The section further required that there be

included at least so much of the community property passing at the decedent's death as was *subject to the decedent's power of testamentary disposition.* Thus, in a community property estate, where each spouse may by will dispose of one-half the value of the property held in community, at least one-half of the value of such property would be included in the estate of the first to die, even though that spouse may have contributed nothing to the community.

It will be seen from the foregoing summary that the primary concern of Congress in enacting Section 811 (e)(2) was to remove the tax advantages enjoyed by residents in community property states over those residing in the non-community property states, thereby equalizing the tax burden of all of its citizens, and thereby increasing its tax revenue. *Fernandez v. Wiener,* 326 U.S. 340, 90 L.ed. 116.

It will be noted, however, that the law of the state is recognized in determining the *minimum* taxable estate under this section by the provision requiring inclusion of "such part of the community property as was subject to the decedent's power of testamentary disposition." By this statute, Congress therefore clearly intended to include at least that portion of the community property which was subject to testamentary disposition by the decedent, as well as to include the survivor's portion over which the decedent obviously had no such testamentary powers, unless the survivor could show that such portion was received as compensation for personal services actually rendered.

It is apparent that Congress had no intention of

defining in Section 811(e)(2) the type or nature of the property to be taxed, by re-defining the term "interest" as it could have done. On the contrary, its predominant and only purpose was to tax the interest of the surviving spouse in the community property, which previously was held immune from the estate tax, along with the decedent's interest in the community property over which decedent possessed the power of testamentary disposition.

In the court below, appellant made no contention that the entire cash surrender value of the policies should have been included in decedent's gross estate; that is, not only decedent's interest in one-half thereof, but also the interest of the survivor in and to his half, for it was expressly stipulated and agreed that the only question involved was: "Whether one-half of the cash surrender value of life insurance policies on the life of decedent's husband was properly included in decedent's gross estate for Federal Estate Tax purposes (R. 18).

In its Trial Briefs, appellant's primary thesis was that the cash surrender value of the life insurance policies involved in this case was community property and, therefore, subject to decedent's power of testamentary disposition under Rem. Rev. Stat. of Washington Sec. 1342.

This thesis, however, could not be sustained in view of the decision by the Supreme Court of the State of Washington in *In re Knight's Estate,* 31 Wn.(2d) 813, 199 P.(2d) 89. There, the State of Washington attempted to tax under the State Inheritance Laws, one-half of the cash surrender value of a policy of insurance as

part of the estate of the deceased wife, who was the beneficiary named in the policy, exactly as is contended for here by the Government.

The question involved was whether the property sought to be taxed was such as to fall within the definition of the taxing statute which covered all *property* within the jurisdiction of the state, whether tangible or intangible, "which shall pass by will or by statutes of inheritance."

The court held that such an interest was not taxable since the right to surrender a policy and take the cash value thereof stands upon the same legal basis as the right to the proceeds of the policy itself, and like the right to receive the proceeds, arises out of the *contract of insurance,* and does not spring from the death of a testator who is the beneficiary named in the policy.

The court also pointed out that if the legislature had desired to impose an inheritance tax upon the *cash surrender value* of life insurance policies, as part of the estate of a deceased beneficiary, it would have been easy to express that intention in the statute which it enacted, which by its express terms, applied only to "insurance payable upon the death of any person."

The court further pointed out that the policies involved were all payable upon the death of an insured who was the surviving spouse, and nothing whatever became payable on the death of the beneficiary, the deceased wife. On this feature, the court said:

> "In other words, even if the cash surrender value of a life insurance policy be considered to be property, still it is not property which passes by will or

by the statute of inheritance. Whatever may be realized by anyone on the cash surrender value of such policies is acquired solely by virtue of the contract between the insurer and the insured.

"In the briefs of counsel, a number of cases are cited wherein this court has gone to some lengths to preserve and protect the wife's interest in insurance policies upon the life of her husband, where the premiums are paid with community funds. While these cases are generally opposite in considering and determining the effect of community property laws upon such insurance policies, they are of no particular assistance in the solution of the problem presented in this case.

"The cash surrender value of the policies here involved is neither property which passed by will or by the statute of inheritance, under Remington's Supplement 1945 §11201, nor 'insurance payable upon the death of any person,' as provided in Remington's Revised Statutes (Supplement) §11211 (b). It therefore is not subject to an inheritance tax."

Since, therefore, the State of Washington has held that the cash surrender value of a life insurance policy is not "property" which passes by will or by statutes of inheritance, it necessarily follows that no part of it can be subject to the decedent's power of testamentary disposition. And if it is not subject to decedent's power of testamentary disposition, it cannot possibly become a part of decedent's gross estate for Federal Tax purposes under Section 811(e)(2), for the Federal Statute is necessarily tied in with the State law when it comes to determining what is property in that state over which the decedent had the power of testamentary disposition.

Thus, Section 811(e)(2) expressly acknowledges this umbilical union with the state law by providing that the *minimum* interest to be included shall be such part of the community property as was subject to decedent's power of testamentary disposition.

The appellant has now "changed its tune." Its opening brief now concedes that "one-half of the cash surrender value of the policies was not property which passed by will or inheritance upon decedent's death" (Br. 9).

Instead, it now argues that Section 811(e)(2) does not by its terms apply only to community property which passes upon decedent's death by will or inheritance, but that the statute unqualifiedly requires the inclusion in a decedent's gross estate of the value of property "held as community property by the decedent and surviving spouse," except such part thereof as may be shown to have been received as compensation for personal services actually performed by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse (Br. 14). The argument is further made that in the absence of a showing that some part of the property was attributable to the separate property of the surviving spouse or to compensation for services actually performed by the surviving spouse, "the entire value of the community property, and thus the value of the share of the *surviving spouse,* is includible in the decedent's gross estate *despite the fact that the surviving spouse's share does not pass by will or inheritance at the decedent's death or even pass to anyone in any manner at that time*" (Br. 15).

In other words, appellant apparently has abandoned its original position that one-half of the cash surrender value was taxable because it belonged to the *decedent* and was subject to her powers of testamentary disposition, and has shifted to the position that the interest of the *surviving spouse* is properly includible in decedent's estate, because there has been no showing in the record that the surviving husband's portion was attributable either to his separate property or to compensation for personal services.

This is a theory not heretofore seriously urged, and if it had been stressed, it would have been very easy for appellees to prove that at least one-half of the premium paid on the policies in question was received as compensation for personal services actually rendered by the surviving spouse. In fact, the government has never required proof of such fact in the past on any estate involving a decedent *wife,* since it was assumed that the husband was the "breadwinner" and that he could always prove that at least one-half of the community property resulted from compensation for personal services rendered by him.

Such a contention coming at this late point should therefore not be considered, and if this court deems such a point vital to a decision herein, appellees respectfully urge that they be allowed to introduce proof of that fact, by remanding the case back to the trial court for that purpose only, so that an express finding can be made thereon.

We do not believe, however, that appellant is serious in that regard, for singularly enough, the collector

accepted appellee's Estate Tax Return without any question whatsoever being raised that only one-half of all the community property was reported by appellees. The only deficiency assessed was due to certain additions to income and disallowance of deductions, neither of which is at issue in the present action (R. 18).

Regardless of this contention, however, if decedent's interest in the policy was not subject to testamentary disposition, and therefore not includible as part of *her* gross estate, how can it logically be argued that the husband's interest therein, which likewise is not subject to a testamentary disposition on his part, should be includible as part of the wife's estate? To so argue, is like saying that zero plus zero equals one.

The true purport of *In re Knight's Estate,* 31 Wn. (2d) 813, 199 P.(2d) 89, is that this intangible interest known as "cash surrender value" is not that type of property which can be taxed upon the death of either spouse, *in the absence of express legislative sanction,* since it is not that type of interest which is subject to the power of testamentary disposition by either spouse.

We submit that the power of testamentary disposition over community property is vital to the operation of Section 811(e)(2), and that Congress was speaking of only that type of property, for otherwise the inclusion of the last sentence of that section would have been meaningless.

The case of *Fernandez v. Wiener,* 326 U.S. 340, 90 L.ed. 116, does not compel a different conclusion, for the problem there was solely one of constitutionality, it being conceded that the Commissioner correctly applied

the statute. No question was presented therein concerning the taxability of "cash surrender value" of a life insurance policy. It was merely concerned with whether Congress had the constitutional power to provide that the portion of the surviving spouse in the community property is to be included in the decedent's gross estate, and we submit that it was concerned only with that type of community property which, in the ordinary sense, is transferable by death. The *Wiener* case, although perhaps persuasive of the proposition that a statute requiring inclusion in the gross estate of a decedent of all community property of the decedent and the surviving spouse, is constitutional, certainly does not justify the conclusion that this statute as written is to be interpreted as the Government contends it should be in the instant case as applied to the cash surrender value of life insurance policies on the life of the surviving spouse. See *Rickenberg v. Commissioner of Internal Revenue,* 177 F. (2d) 114 (C.C.A. 9).

Furthermore, if appellant's contention is correct, why did it stipulate in the court below that only *one-half* of the cash surrender value of the policies was in issue herein, and attempt to convince the trial judge that it was includible in decedent's estate because it was subject to *her* power of testamentary disposition. Certainly, appellant was not referring to the *husband's* interest in making such argument, for obviously she had no power of testamentary disposition over his portion of community property. Besides, to be consistent, appellant should have taken the position in the court below that *all* of the cash surrender value was includ-

ible in her estate, rather than stipulate that only one-half was at issue in the proceeding.

But there is another simple answer to such contention. It will be noticed that 811(g)(4) governing *community property life insurance* specifically provides that the *premiums* paid with community property "shall be considered to have been *paid* by the insured." Thus there is a statutory presumption that the premiums paid on the policies herein involved were paid by the *insured,* viz., the husband, who is the surviving spouse. This should remove any vestige left of appellant's argument that since there was no showing made in the court below that some part of the "property" was attributable to the separate property of the surviving spouse or compensation for services actually performed by him, that therefore *his* share of the cash surrender value should be held includible in his *wife's* estate.

II.

Congress Expressly Covered the Taxability of Life Insurance by Section 811 (g) and If It Intended to Tax Any Part of the Cash Surrender Value of an Insurance Policy Upon the Death of the Non-Insured Spouse, in a Community Property Estate, It Would Have Logically Covered the Subject in That Section Rather Than Leave the Matter to Speculation and Doubt Under Section 811 (e) (2).

It is quite significant to note that Section 402(c) of the Act of 1942 specifically stated:

"For treatment of life insurance acquired with

> community property, see amendment to Section 811(g) made by Section 404 of this Act."

This would seem to clearly indicate that Congress was not attempting to cover the subject of life insurance, or any of its phases, such as cash surrender values, in Section 811(e)(2), but instead referred to another Section, namely 811(g), where the subject was to be covered.

Referring now to Section 811(g), we find Congress legislating only with reference to the *proceeds* of life insurance, whether receivable by the executor or by other beneficiaries. The only reference to community property is found in Subsection (4) reading as follows:

> "(4) Community property.
>
> "For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community."

This subsection assumes that the decedent is the insured and clearly contemplates that the death of the insured has occurred as the result of which proceeds of the policy have ripened into payment to stated beneficiaries. It makes no attempt to tax the cash surrender

value of such a policy upon the death of the non-insured spouse in a community property estate. If such an interest was sought to be taxed, we would expect such a provision to appear under this section where it logically would belong, rather than groping in the dark to find it lurking in Section 811(e)(2). It would have been easy for Congress to express that intention under this section which it enacted. By failing to do so, it can only be assumed that Congress did not intend to tax such an interest, for it certainly did not hesitate to be specific concerning the taxation of other interests on which there could be some doubt, such as transfers intended to take effect in possession or enjoyment at or after death, transfers with possession retained, transfers with right to designate who shall possess or enjoy, transfers with power to change the enjoyment, power relinquished in contemplation of death, and powers of appointment, under other portions of Section 811.

Anticipating this argument, appellant states that this contention is "untenable" since the committee reporting on the Revenue Act of 1942 made the statement that Section 811(g) does not constitute the only section under which life insurance is includible in the gross estate (Brief 19).

Appellant cites *Vanderlip v. Commissioner* (C.A. 2d) 155 F.(2d) 152, and *Davidson's Estate v. Commissioner* (C.A. 10) 158 F.(2d) 239, in support of that statement.

Those cases, however, involved transfers by the decedent to trustees prior to death, and such transfers were held to have been made in contemplation of death and

therefore taxable under Section 811(c) after the death of the transferor when the *proceeds* became payable.

The cases cited, and the remarks of the committee quoted in appellant's brief are certainly far removed from the present controversy wherein the insured spouse has not yet died, no transfer of the policies has been made to another, and no proceeds have as yet emanated from the insurance. We doubt seriously that the committee had such a situation in mind when they made that statement.

It is also interesting to note that not even the present regulation 105 promulgated by the Commissioner pertaining to life insurance, Sec. 81.25, makes any mention of the applicability of any other subdivision of Section 811 as covering the cash surrender value of life insurance policies. Instead it speaks only of the taxability of proceeds under Section 811(c) which governs transfers made in contemplation of death.

We can expect appellant to counter with the argument that since Section 811(e)(2), together with other estate tax provisions relating to community property, was repealed by Section 351(a) of the Revenue Act of 1948, it was not necessary to incorporate such interpretation in the regulation. But appellant concedes that since the repeal of Section 811(e)(2), community property has been includible in a decedent's gross estate only to the extent it is includible therein under Section 811(a) which relates to "decedent's interest" in property (Brief 10). And if appellant's primary thesis is correct that decedent had an interest in one-half the cash surrender value of the policies, it would

seem that repeal of Section 811(e)(2) is immaterial, since we believe that the Commissioner of Internal Revenue will still attempt to collect a tax on the interest of the non-insured spouse in community property states under the present Section 811(a). This, in itself, would indicate that reliance upon Section 811(e)(2) was made originally because the Government erroneously concluded that decedent's interest in the policies was subject to testamentary disposition, and therefore clearly taxable under Section 811(e)(2).

III.

No Interest Was Possessed by Decedent at the Time of Her Death in and to Any Part of the Cash Surrender Value of the Policies on Her Husband's Life so as to Be Taxable Under Section 811 (a).

While appellant makes no contention in its brief that decedent's interest in the cash surrender value is taxable under Section 811(a), we believe that a discussion thereof is warranted since the word "interest" is used in both Subdivisions (e)(2) and (a) of Section 811, and the interpretation given to the word under Subdivision (a) should be accorded the same meaning in Subdivision (e)(2). Subdivision (a) of Section 811 was Section 302(a) of the 1926 Act and has been in effect at all times since 1926. It requires the inclusion in a decedent's estate of all property "to the extent therein of the decedent *at the time of his death.*"

It will be noticed that the terms of the statute are general and there is little chance of having any kind of property excluded if decedent had an *interest* in it.

The principal problem arising under this Section is

whether decedent had an interest in property *at the time of his death,* and what was its extent at that time? The answer to this question has provided most of the difficulties which arise under this section. Under the decisions which have been handed down in cases arising out of this question, we are able to come to certain general conclusions. If the interest had come into existence prior to decedent's death, and was not defeated thereby, the value thereof at the time of death is includible under Section 811(a). Similarly, where the decedent had only a life interest under a transfer by another, there is nothing left to tax at the time of his death. If the interest was one which was accruing to him at the time of his death, and was enforceable by his estate, so much thereof as had accrued at the time of his death is includible. Thus, accrued salaries, commissions, income, etc., are includible. But, where such items are not required to be paid into his estate, they are not includible, even though paid to the executor, and, if the amount or right to anything is contingent upon the happening of some future event, such as the winning of a lawsuit for a client, nothing is includible even though payment may later come to the executor. (See C.C.H. explanation, Federal Estate and Gift Tax Reporter, Paragraph 1300.05.)

In order therefore to answer this question, it is necessary to understand the nature of the subject matter which is here involved.

A policy of life insurance is a contract. It is commonly a tri-parte agreement, to which the parties are the insured, the insurer, and the beneficiary. It is generally defined as a *contract* wherein a person called the

insurer, for a certain sum of money agrees that, if another person, named in the insurance policy as the insured, shall die within the period limited therein, the insurer will pay the sum so specified in the contract according to the terms thereof, to the person designated in the policy as the beneficiary. 1 Couch, Cyc. of Insurance Law, 49 §34; C.J.S. 484, Insurance, §25.

The term "cash surrender value" means the cash value, ascertainable by established rules, of a contract of insurance which has been abandoned and given up for cancellation to the insurer by the person having *contract right* to do so. *In re Welling* (C.A. 7) 113 Fed. 189.

The contract of life insurance differs from most other contracts in that it is not intended primarily for the benefit of the insured, but of some dependent. Its original and fundamental conception is a provision by small periodical contributions to secure a benefit for the family.

The designation of a beneficiary named in a policy of life insurance procured by the insured is in the nature of a declaration of trust. The insured who procures such a policy holds the insurer's promise to pay the proceeds, for the benefit of the beneficiary. And if a beneficiary's interest is terminated by his death before the death of the insured and no other beneficiary is designated to take that interest, it reverts as a lapsed trust to the legal representative of the insured. *Kruger v. John Hancock Mutual Life Insurance Co.* (Mass.) 10 N.E. (2d) 97, 112 A.L.R. 725.

If, therefore, a life insurance policy can be likened

to a trust, it would appear that decedent's only interests in the policy were: (1) the right *during her lifetime* to prevent a change of beneficiary; and (2) the expectancy that if she survived her husband, the insured, she would become entitled to the proceeds.

As to the first, her interest is merely a negative one; namely, the right to object to a change in the policy by the insured. As to the latter, her interest consists of nothing more than an expectancy. Neither interest can be said to have been in existence at the time of her death, since both are automatically defeated by her death.

Her death passed no interest in the ultimate proceeds or to its cash surrender value. Her death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility. *Helvering v. St. Louis Union Trust Co.,* 296 U.S. 39, 80 L.ed. 29.

There are two Tax Court decisions that are analogous. In *Estate of Gertrude Royce,* 46 B.T.A. 1090, decedent's husband created a trust, reserving to himself the income for life and the right to withdrawals of principal for his maintenance and support, within the discretion of the trustees. After his death the income was to be paid to decedent (his wife) for life with remainders over to his son. In addition to the income, decedent had the right during her lifetime to withdraw any or all of the trust *corpus*. Held, that no part of the trust *corpus* is includible in decedent's gross estate for the purpose of the federal estate tax.

The Commissioner there contended that because, during her life, decedent had complete beneficial ownership of the *corpus* through her right entirely to withdraw it from the trust, it therefore followed that the value of the *corpus* of the trust was includible in her gross estate under the provisions of §302(a) of the Revenue Act of 1926 which provided that the value of the gross estate of the decedent shall be determined by including the "value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—(a) to the extent of the interest therein of the decedent at the time of his death."

The Board of Tax Appeals assumed that Congress had the power to impose the estate tax in such a case, but queried whether Congress had actually exercised that power.

The Board, however, reached the conclusion that there is nothing in the language of the act indicating that Congress intended to include interests of a decedent which terminate at death, and therefore since the rights of the decedent to withdraw the trust *corpus* terminated at her death, neither the trust property nor her intangible rights therein were subject to distribution as part of her estate.

The Board also pointed out that a similar problem was considered by the District Court for the Southern District of New York in *Davis v. United States,* 27 F. Supp. 698, wherein the Commissioner contended that because the decedent had a life interest in certain property, coupled with a power of sale, the value of the property was includible in the decedent's gross estate. The

court, without deciding whether an absolute power of sale did exist, held that such a power would not be an "interest" within the meaning of §302(a), saying:

> "For even if the power of sale were a power over an undivided share outright, such a power is not an 'interest' within the meaning of §302(a). That provision deals with property owned by a decedent and passing at death by will or intestacy. Subsequent provisions in §302 deal with property over which a decedent had powers."

The Board also pointed out that the problem of the scope of §302(a) was considered in *Helvering v. Safe Deposit & Trust Co. of Baltimore,* 316 U.S. 56. The decedent in that case, a minor, was the beneficiary of a trust created by his father and was to receive the income until he reached age 28, at which time he was to become the absolute owner of the property. He was given a general testamentary power of appointment over the trust *corpus* which he attempted to exercise when he still lacked testamentary capacity in the state in which he was domiciled. The Commissioner contended that the decedent had an "interest" in the trust *corpus* within the meaning of §302(a). With respect to this argument, the Board had said:

> "His power of appointment, which gave him a complete power of testamentary disposition during life, did not, as we read the statutes, constitute an 'interest' under subsection (a). That a subsequent subsection, (f), should treat it as taxable in certain circumstances we think is immaterial. We conceive that the word 'interest' as used in subsection (a), refers to a transferable estate, and not something which, like a life estate or power, ceases altogether on the donee's death. If it includes anything which

ceases at the decedent's death, the inclusion must be in express words."

The Supreme Court reached the same result on this point and held that an unexercised general power of appointment is not an "interest" within the meaning of §302(a).

The *Royce* case was cited as authority in *Susie C. Haggett Estate,* 14 T.C. 325, promulgated March 1, 1950. One of the questions there involved was whether any part of the commuted value of an annuity policy was properly includible as a taxable transfer by the decedent. There, the wife purchased with funds given to her by her husband, an annuity policy in which her husband was the "annuitant." The annuity payments were payable to the wife during the lifetime of the annuitant, and the policy gave her the right to receive the cash surrender value or change the beneficiary without the consent and to the exclusion of the annuitant or any other beneficiary. None of these powers, however, were ever exercised by the wife.

The policy also provided that upon the death of the husband (annuitant), the payments were to be payable to the wife if she survived, and after her death, to certain specified grandchildren.

The wife survived the husband, and she continued to receive the payment in accordance with the policy, but upon her death, the Commissioner sought to include the commuted value of the annuity policy as part of her gross estate.

The Tax Court, in concluding that no amount with

respect to such annuity contract was includible in decedent's estate, said:

> "The present decedent's interest in the annuity contract was that of a life beneficiary with the power to surrender the contract and receive its then cash value, and also the power to change the beneficiaries. Neither of these powers was exercised by her during her lifetime. But a mere power with respect to property is not such an interest therein as subjects it to the provisions of §811(a) of the Internal Revenue Code. (Citing the *Royce* case.) No taxable interest in the annuity contract ever belonged to her and, therefore, she did not make any transfer in respect of such contract requiring the inclusion of any amount as the value thereof in her gross estate pursuant to the provisions of §811(c) or (d) of the Code."

So here, the mere power by the decedent wife of (a) preventing her husband from changing the beneficiaries, or (b) of receiving one-half of the cash surrender value in the event the policies were cancelled prior to her death were mere powers which terminated at her death, and therefore do not constitute such an interest therein which survived her death so as to make them includible in her estate under Section 811(a).

It will be seen from the foregoing decisions that the Board of Tax Appeals and the Supreme Court have construed the word "interest" in Section 811(a) as meaning property owned by a decedent *and passing at death by will or intestacy,* and that it does not refer to something which like a life estate or power, ceases altogether on decedent's death.

We submit that the same meaning should be attached

to the word "interest" wherever used in Section 811 (e)(2), since there can be no logical reason for giving the same word two different meanings in the same section of the code. Therefore when Congress referred to "the interest therein held as community property by the decedent and surviving spouse" it could only mean such interest in community property which would pass *by will or intestacy,* and not to mere powers which ceased altogether upon the death of either spouse.

To say that because the Washington court has held that the husband, who pays the premiums on a life insurance policy from community funds, cannot change the beneficiary without his wife's consent—because it is a community asset which he cannot give away to strangers without consideration—it therefore follows that the wife's interest therein is includible as part of her estate is a non-sequiter. After all, the cash surrender value of an insurance policy is merely a potential asset of the community. It does not become an actual asset until the money is reduced to possession by surrender and cancellation of the policy. Until the occurrence of that condition, the wife during her lifetime, cannot convey her interest to third parties, for obviously such an attempted transfer would defeat *protanto* the right of the ultimate beneficiaries, and would in effect, amount to a testamentary disposition of the proceeds of the policy without effecting a change thereof as required by the contract.

Thus, the court in *In re Towey's Estate,* 22 Wn.(2d) 212, 155 P.(2d) 273, recognizes that if a husband desires to make a testamentary disposition of his one-half of the community property, consisting of the *proceeds* of

insurance policies, he can only do so by making the proceeds of those policies payable to his estate. By the same token, the wife is powerless to convey the proceeds of an insurance policy by will unless she procures a change of beneficiary to her estate. Otherwise, the rights of the ultimate beneficiary, which became vested upon the death of the insured, by virtue of the contract, could become divested through the exercise by either spouse of testamentary disposition.

IV.

CONCLUSION

We conclude by saying that no part of the cash surrender value of the policies on the surviving husband's life was includible as part of the gross estate of decedent wife either under subdivisions (a) or (e)(2) of Section 811, and that therefore the judgment of the District Court in so holding was correct and should be affirmed

Respectfully submitted,

Eggerman, Rosling & Williams,
Joseph J. Lanza,
Attorneys for Appellees.

APPENDIX

Internal Revenue Code

Sec. 811. Gross Estate

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.* To the extent therein of the decedent at the time of his death. * * *

(e)(2) (as added by Sec. 402(b)(2) of the Revenue Act of 1942, *supra*). *Community Interests.* To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. * * *

Cross Reference. For treatment of life insurance acquired with community property, see amendment to Sec. 811(g) made by Sec. 404 of this Act. (Revenue Act of 1942 Sec. 402(c).)

* * * * * * *

(g) *Proceeds of life insurance.* (As amended by Sec. 404 of the Revenue Act of 1942.)

(1) *Receivable by the executor.* To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.